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Carla K. Parker v. Dale S. Parker : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CARLA K. PARKER, Petitioner/Appellee, vs. DALE S. PARKER, Respondent/Appellant.	DOCKET NO. 981362-CA CASE NO. 981362 - CA DC No. 954904494 PRIORITY NO. 15

REPLY BRIEF OF APPELLANT

APPEAL FROM DECREE OF DIVORCE AND ORDERS IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE SANDRA N. PEULER PRESIDING

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IN THE UTAH COURT OF APPEALS

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DALE S. PARKER,	:	
Respondent/Appellant.	:	PRIORITY NO. 15

Appellant, DALE S. PARKER, hereinafter "Husband" or "Respondent", submits the following Reply Brief:

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING A BIFURCATION OF THE DIVORCE.

It is acknowledged that a trial court may bifurcate issues, pursuant to Rule 42 of the Utah Rules of Civil Procedure, "in furtherance of convenience or to avoid prejudice . . . ." Therefore, it follows, that a bifurcation should not be granted where to do so would ***cause*** prejudice to a party, not "avoid" prejudice. See Breuer-Harrison, Inc. v. Combe, 799 P.2d 716, 730 (Utah App. 1990).

In the present case, the trial court bifurcated the parties' divorce and reserved all other issues for the time of trial. Specifically, the Order of Bifurcation did not address the date that the marital estate was to be valued and nor did it award either party any particular account, asset or parcel of property. However, given the fact that the Wife had control of and use of and appreciation from eight of the nine bank accounts that the parties held and the majority of the parcels of property that the parties held, as well as control of the marital development projects, the bifurcated decree served to artificially divide those assets, though the documents divorcing the parties do not make that allocation. The Husband entered an objection to the Commissioner's recommendation because the Order of Bifurcation served to prejudice him and he knew at the date that it was granted that it would serve to prejudice him. His intention in preventing the bifurcation was not to prevent the parties from actually divorcing, but was to prevent the divorce from occurring without the thoughtful division of the marital assets and careful consideration of the rights and obligations of each of the parties.

In the instant case, the Decree was entered and a de facto allocation of assets occurred which de facto allocation benefited the Wife. The Husband was not allowed an equal or equitable distribution of the marital estate, even after a 25 year marriage. There was little, if any, premarital property brought into the marriage, however, Wife argued that a bifurcated decree would "eliminate the risk by [Husband] that ***investments [Wife] has*** or property

[Wife] acquires in the future ***or assets which appreciate in value*** should be part of the marital estate, and therefore, subject to equitable distribution." However, under Utah law, as there was no premarital property, Husband was entitled to an equitable interest of each of the marital investments and the appreciation thereto, regardless of whether or not Wife had control of them. All substantial assets that existed at the date of the bifurcated decree existed at the date of trial, and under Utah law, those assets, whether they appreciated in value subsequent to the bifurcation and prior to the divorce trial, were marital assets subject to equitable distribution. Marsh v. Marsh, 361 Utah Adv. R. 12 (Jan. 22, 1999) ("[M]arital property 'encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived;' " (quoting Gardner v. Gardner, 748 P.2d 1076, 1079 (Utah 1988) (quoting Englert v. Englert, 576 P.2d 1274, 1276 (Utah 1978))). It is contrary to Utah's entire body of law concerning marital property and its equitable distribution to allow Wife to employ a bifurcated decree as a manipulation technique to deny Husband an equitable share of the marital estate, or the appreciation thereto. Husband requested, but was denied, a hearing on this issue in order to provide evidence as to the prejudice to Husband. The trial court entered the divorce, and then later established this date as the valuation date of the marital estate.

Wife argues in her Brief that bifurcation in a divorce action "is not only permissible but in some cases necessary to ensure that one party by simply using the legal relationship

of husband and wife to gain an unfair advantage in a final property and debt distribution." (Appellee Brief, p. 22). Indeed Husband does not disagree with this conclusion that ***in some cases*** this is true. However, ***in some cases***, such as this one, where one party has control over the vast majority of the assets, a bifurcation should not be entered by the court which would allow one party "to gain an unfair advantage in a final property and debt distribution." It is uncontroverted that Wife requested the bifurcated decree to "eliminate the risk of claims" by Husband to marital investments controlled by Wife, and the appreciation thereto. Therefore, Wife seems to argue that not only should a bifurcated decree be granted to keep one party from getting an unfair advantage in a divorce, but also that a bifurcated decree should not be denied where it is employed to allow one party an unfair advantage in a divorce. In sum, a bifurcation should not be employed to set the valuation date of the marital estate where evidence as to the value and division of the estate is not taken until over a year later. Otherwise severe prejudice will happen where one party has control of the majority of the assets and bank accounts, as in the present case.

Wife also argues that "the trial court correctly concluded that there was no justifiable reason for the continuation of the legal relationship of Mr. and Mrs. Parker as husband and wife." (Appellee Brief, p. 24). However, this argument does not consider that there was substantial marital property which Husband had an equitable interest in which Wife had control of and dissipated as she wished subsequent to the bifurcation. The trial court did not

take evidence as to the value of the marital accounts or property or the prejudice caused to the Husband at the time of bifurcation. Wife had complete access and control of eight of the accounts, and the parties had joint access and control to the one remaining account.

Subsequent to the bifurcation, Wife continued to use these marital accounts as she pleased. Husband had no access to these marital accounts. At the date of separation, the account Husband had access to an account which consisted of $688.41 while the eight accounts Wife controlled consisted of $134,516.49. At the date of the bifurcated divorce decree, the balance in the accounts in control of Wife was then $36,986.74 and the balance in Husband's account totaled $1,735.37. Therefore, the accounts in Wife's control diminished nearly $100,000.00 during the six months between the parties' separation and the entry of the bifurcated order. Clearly, the prejudice to the Husband is substantial and creates a serious inequity.

After trial, the court found that "[t]here is no specific accounting of all of the bank accounts, however, either as to the source of deposits or nature of expenditures, that will allow the Court to accurately determine any net value of the accounts to divide the same fairly. Therefore, the Court awards each account to the holder of the same, and makes no valuation for purposes of the marital estate." (R. 829). Therefore, the court did not consider the initial depletion of $100,000 from the date of separation to the date of the bifurcated decree, nor did the court even employ an offset for the $36,000 difference in the accounts

as of the date of the bifurcated decree. In essence, the court used the date of the bifurcated decree to create a de facto property distribution.

This bifurcated decree was not entered "in furtherance of convenience or to avoid prejudice" as prescribed by Rule 42 of the Utah Rules of Civil Procedure. The bifurcation ***caused*** prejudice to Husband. Therefore, the trial court abused its discretion in bifurcating this action on April 15, 1996 and then subsequently using this date as the valuation date of the marital estate when no actual formal division of the estate was made until over one year later.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING THAT THE DATE OF VALUATION OF THE MARITAL ESTATE WOULD BE APRIL 15, 1996, THE DATE OF THE BIFURCATED DECREE, RATHER THAN THE DATE OF TRIAL.

Generally, the marital estate should be "valued at the time of divorce or trial." Shepherd v. Shepherd, 876 P.2d 429, 432 (Utah App. 1994) (citing Rappleye v. Rappleye, 855 P.2d 260, 262 (Utah App. 1993); Berger v. Berger, 713 P.2d 695, 697 (Utah 1985); accord Fletcher v. Fletcher, 615 P.2d 1218, 1222-23 (Utah 1980); Peck v. Peck, 738 P.2d 1050, 1052 (Utah App. 1987). The general rule is followed except where one party has "dissipated an asset, hidden its value, or otherwise acted obstructively." Peck, 738 P.2d at 1052; see also Shepherd, 876 P.2d at 433 (affirming the trial court's use of a date other than the date of divorce where one party utilized portions of the marital estate for his own support

and the other party had little or no access to the liquid assets of the estate during the pendency of the action); Andersen v. Andersen, 757 P.2d 476 (Utah App. 1988). Contrary to the apparent representation of Wife in her brief, there is no rule or case law which provides for a valuation date for the marital estate when a ***bifurcated*** divorce decree is entered. Therefore, in determining the valuation date for the marital estate, the trial court must determine which valuation date will provide the most equitable distribution. Clearly, the body of law that has developed in Utah regarding the valuation date for a marriage contemplates the divorce date being the date of trial when testimony is taken, so that an informed, intelligent and equitable decision can be made in the division of the marital estate.

Subsequent to hearing, the trial court ordered that the marital estate would be valued as of April 15, 1996, the date the bifurcated decree was entered. However, there was no division of the marital estate as of April 15, 1996, and there was no evidence as to what the marital assets consisted of, what their respective value was, nor was there any temporary division of said assets. As set forth in the statement of facts, the vast majority of these assets were controlled by Wife at April 15, 1996. Therefore, the trial court's decision actually manufactured an artificial date to value the marital estate, though the estate had not been divided at the earlier date. In so doing, the trial court divided it de facto to the prejudice of Husband.

Again, the substantial portion of the real property assets, including the most valuable asset, which is the Murray Parkway project, and eight out of nine bank accounts were under Wife's control and by virtue of this, effectively awarded to her, as well as the appreciation on these marital assets from April 15, 1996 until the trial in October of 1997. This award occurred solely because of this artificial date of valuation and the de facto award of the asset by virtue of the "accident" of possession of the asset at the date of the bifurcated decree.

Wife argues that "[b]y making this decision the trial court in no way made any distribution of the assets in question by Mr. Parker. Rather it selected a point in time consistent with the general rule in Utah to determine what comprised the marital estate and what the estate was worth at that particular point in time." (Appellee Brief, p. 29). However, the trial court actually ordered that "each account [be awarded] to the holder of the same, and makes no valuation for purposes of the marital estate." (R. 829). Wife was the "holder" of eight of the nine marital accounts, or 99.5% marital funds at the date of separation and 95.5% as of the date of the bifurcated decree.[1] Therefore, a de facto property distribution was made to Wife by way of the bifurcated decree which greatly prejudiced Husband. The same de facto division occurred with regard to the Murray Parkway property

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[1] Total funds in the marital accounts at the date of separation = $135,204.90; total funds in the marital accounts at the date of the bifurcated decree = $38,722.11; amount in accounts which Wife was the "holder" of at separation = $134,516.49; amount in accounts which Wife was the "holder" of as of the bifurcated decree = $36,986.74.

because that development was under the control of the Petitioner during the pendency of the proceedings and subsequent to the bifurcated decree and the court reasoned in its findings that the Petitioner's personal time spent in the development of the property over the course of the period up to the date of the decree obviated in favor of the same being awarded to Petitioner. Again, this resulted in a de facto award of this most substantial marital asset to Petitioner, because of her acts and the court's granting of a motion to bifurcate and valuing the marital estate at the date of the bifurcation.

Regardless of when the bifurcated order was entered, since the marital assets were not divided by the court, all of the marital assets remained marital assets until the division of the assets at the trial and by the court' s minute entry decision. Because these assets remained marital assets until the Supplemental Decree of Divorce was entered, the appreciation of these assets is also a marital asset which should have been equitably divided by the trial court, rather than simply being awarded to the "holder" without any further consideration.

Wife also argues that the entry of the bifurcated order and the use of this date as the valuation date for the marital estate "was the fair way to ensure that one party was not allowed to simply sit back and then at some unknown future point in time take advantage of the hard work, time and effort which had been expended by the other in furthering and bettering his/her financial position." (Appellee Brief, p. 30). However, Husband has not made any claim as to any of Wife' s hard work or effort made after the parties' divorce in

relation to non-marital assets. The claims which he has made are concerned only with ***marital*** assets which were completely under Wife's control since the separation, some of which were depreciated (bank accounts lost approximately $100,000 from date of separation to date of bifurcation), and others which appreciated (real estate, and development property) during this time and until the date of trial.

By virtue of the trial court using April 15, 1996 as the date of valuation of the marital estate, the trial court effectively "divided" the estate as of that date, greatly prejudicing Husband with regards to the parties' interest in all of the marital assets, including the marital interest in the Murray Parkway, LLC. As of April 15, 1996, the land was still mostly undeveloped. The pasture land value of this property was far less than its development value. Both of the parties, the witness Martin Merrill, and the court each commented on the speculative future value of this project. By valuing the Murray Parkway, LLC as of April 15, 1996, even though there is no dispute that it was a marital asset purchased for development from Husband's family, the Husband has been severely financially prejudiced.

The court, in the pre-trial motion, had ordered the valuation date to be April 15, 1996. The court refused to hear evidence of the "current" value of the marital estate or assets at the date of the parties' divorce trial. The Husband renewed his request at trial for the court to permit evidence of the "current" value of the marital assets and the court, again, declined to permit such evidence. The Wife cannot now claim that Husband was at fault for failing

to provide evidence of value of the various assets, because the court specifically found that all appraisals that were to be performed were to value the property as of April 15, 1996. Husband did provide his testimony, however, regarding the future value of the Murray Parkway project and other witnesses testified that the future value was greater than the value of at the date of April 15, 1996 but unknown, due to the speculative nature of the development project.

The trial court abused its discretion in using the date of April 15, 1996 as the valuation date. This defeats the purpose and reasoning of prior cases that require the valuation date be the date of "divorce" because the divorce date is typically the date of trial which is when the assets are actually divided and valued.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO DIVIDE THE PARTIES' INTEREST IN MURRAY PARKWAY LLC, EQUALLY GIVEN THAT THE VALUE OF THE INTEREST WAS DIFFICULT TO DETERMINE AND SPECULATIVE.

A property division made by the trial court will not be upheld "where to do so would work a manifest injustice or inequity." Pusey v. Pusey, 728 P.2d 117, 119 (Utah 1986) (citing Turner v. Turner, 649 P.2d 6, 8 (Utah 1982). In addition, property distributions will be overturned where the trial court fails to follow the standards set by the appellate courts. Potter v. Potter, 845 P.2d 272, 273 (Utah App. 1993) (citing Roberts v. Roberts, 835 P.2d 193, 198 (Utah App. 1992); Dunn v. Dunn, 802 P.2d 1314, 1317 (Utah App. 1990)).

One standard which has been established by the appellate courts is that in fairly dividing a marital estate, if the value of a business interest or stock is disputed or varies widely, "in order to protect the parties, and eliminate altogether the considerable problems in determining value, the in-kind division of [the interest] [is] the proper solution." Savage v. Savage, 658 P.2d 1201, 1205 (Utah 1983).

A substantial portion of the marital estate consists of a 50% interest in Murray Parkway, LLC. The land was purchased from Husband's family with the understanding that Husband would be a co-owner and also be the builder of the homes in the subdivision.

The subdivision, ***as an undeveloped property***, was appraised by Mr. Webber at approximately $32,000 per acre. However, this appraisal did not consider that this property was in the process of becoming a developed property. According to Husband and Mr. Merrill, the property has far greater value as a development. (R. 1023, p. 344, ll. 3-8). However, this value is extremely difficult to accurately determine, due to it being a closely held corporation as well as the difficulty in valuing developing land. Therefore, due to the speculative nature of valuing closely held corporations and land developments, the marital interest in Murray Parkway, LLC should be divided between the parties because "any cash distribution risk[s] doing substantial injustice to one party." Savage, 658 P.2d at 1205.

In Naranjo v. Naranjo, the trial court found that the value of the interest in stock in a closely held corporation was "unknown." 751 P.2d 1144 (Utah App. 1988). Due to the

speculative and unknown value of the stock, the trial court awarded each party one-half of the stock. Id. at 1149. This Court affirmed stating that "[a]n in-kind distribution of closely-held corporate stock is appropriate where the evidence fails to establish the stock's value." Id. (citing Savage, 658 P.2d at 1204-05). Further, this Court stated that "[i]t would be inappropriate, given the speculative nature of the investment . . . for [one party] to receive all of the stock and [the other party] to receive offsetting property." Id.

In the present case, the trial court found that "it is impossible to project [the] future value" of the Murray Parkway Subdivision. (R. 830). In addition, when Husband offered evidence as to the value of the interest in developing the Murray Parkway Subdivision, Wife objected on the basis of the development's speculative nature and the trial court sustained the objections. The court states as follows:

> Appellee's Counsel: Your honor, I would again object. I believe, at this point it would be purely speculative as to what the property might be worth when it's completed.
>
> The Court: I tend to agree. I am going to sustain the objection.
> (R. 1023, p. 343, ll. 21-25).

The trial court valued the Murray Parkway Subdivision as undeveloped land. Only the value of one-half of the parties' equity in the property at April 15, 1996 was divided in the property distribution, even though both parties, witnesses for both parties, and the findings entered by the trial court all acknowledge that the property was bought for and in

the process of being developed. The 33 acres should not have been valued as undeveloped land when, even prior to April 15, 1996, the property was already in the process of early development. (See excerpts from Plaintiff's Exhibit 59 Addendum "O" in Appellant Brief).[2]

The supplemental findings entered on April 27, 1998 state that "although the property is a marital asset, it is impossible to project future value . . . ." (R. 830). This is by no means a justification for not valuing and equitably distributing a marital asset or interest. In discussing similar difficulties with valuing retirement accounts, the Supreme Court of Utah stated that "where no present value can be established and the parties are unable to reach agreement, resort must be had to a form of deferred distribution based upon fixed percentages." Woodward v. Woodward, 656 P.2d 431, 433 (Utah 1982) (quoting Kikkert v. Kikkert, 427 A.2d 76, 79-80 (N.J. 1981)); See also Sorensen, 769 P.2d at 828 (holding that the argument that goodwill in a dental practice should not be subject to equitable distribution because it was difficult to value was the "most unpersuasive

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[2] It should also be noted that the Murray Parkway project will consist of 113 building lots. Wife did testify as to the value of one residential building lot in South Jordan. She testified that it was worth $50,000.00, "and that's very conservative." (R. 1022, T. 54, ll. 4-11). Therefore, assuming that only 100 lots will be developed, at $50,000.00 per lot, that totals $5,000,000.00.

argument," and "the mere fact that goodwill may be difficult to value or elusive in nature, does not justify ignoring or disregarding it altogether in the valuation of marital property.")

Each relevant witness testified that the Murray Parkway property was an investment and that they intended to realize a profit on the property. Husband testified that he expected that the development of the property would realize between one and two million dollars **in profit,** and Wife's witness, Mr. Merrill, testified that the project would have a much greater value once it was developed. (R. 1023, p. 344, ll. 3-8).

> "Whether that resource is subject to distribution does not turn on whether the spouse can presently use or control it, or on whether the resource can be given a present dollar value. The essential criterion is whether a right to the benefit or asset has accrued in whole or in part during the marriage. To the extent that the right has so accrued it is subject to equitable distribution." Woodward, 656 P.2d at 432-33.

Wife has claimed that the court's distribution of the Murray Parkway project to the Petitioner was equitable because of various numbered reasons. The reasons outlined in paragraphs 1, 2, 3, 4 and 7 (Appellee Brief, pp. 33-35) were all rebutted with testimony of the Husband at the time of trial as set forth in the Husband's brief. The testimony was also rebutted by a portion of the testimony of Martin Merrill. Nevertheless, even if the assertions set forth in Appellee's brief, page 33, numbers 1 through 4 were correct, to grant the property to the Wife based upon those articulated reasons flies in the face of Utah case law and the holding of Woodward, supra. Also, as set forth in Appellant's brief and Appellant's

reply brief, the fact that the Petitioner continued to control the development and to prevent the Husband's contribution to the project should not then, de facto, result in an award of the asset to her. Therefore, Appellee's reason number 5 (Appellee Brief, p. 35) is not an equitable or justifiable claim or reason for why the project should have been awarded to Petitioner.

As set forth in Appellant's brief, Appellant stipulated to pay his share of all necessary out-of-pocket expenses of Wife in the furtherance of the development. To that end, as set forth in item 10, page 35, of Appellee's brief, a lawsuit was instituted but then settled by stipulation and order, which stipulation specifically provides for 25% of the proceeds from the sale of the project assets to be deposited into an account pending the decision by this court and, also, specifically requires that Husband reimburse one-half of any out-of-pocket costs incurred by wife. (That stipulation and order are attached as Addendum A) Therefore, the arguments made by Appellee in her brief, page 35, numbers 6 and 10, are without merit.

The interest in the Murray Parkway property was acquired by the parties during the marriage and the right to develop the property accrued "in whole or in part" during the marriage. The right to the real estate development is certainly a right to a benefit, even if a future benefit, which is subject to equitable distribution. As stated in Woodward, where a present value on a future benefit is difficult to ascertain, some distribution according to fixed percentages should be employed. Therefore, as applied to the parties' interest in the right

to the benefit of developing the Murray Parkway property, where the trial court found that "it is impossible to project [the] future value" of the development property, the trial court abused its discretion by not dividing the parties' interest in this marital asset on a percentage basis of the interest according to the standards set by the appellate courts in Savage and Lee v. Lee, 744 P.2d 1378 (Utah App. 1987). For the foregoing reasons, and based upon Utah case law, though parties oftentimes do want to sever financial ties and while there is oftentimes substantial animosity, particularly when a matter proceeds to trial, that does not require a result which provides one party a windfall and prejudice to the other. Therefore, the arguments numbered 8 and 9, on page 35, of Appellee's brief are, again, without merit.

Further, as set forth above, there was clearly no evidence presented to the court as to what the value of the property was at the date of trial nor the future value of this valuable marital asset. For that reason, the last articulated reason that Appellee claims the project should have been awarded to Appellee, number 11, page 35, of Appellee's brief, is not correct and is not supported by the evidence presented.

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO DIVIDE THE PARTIES' VARIOUS BANK ACCOUNTS BETWEEN THE PARTIES OR THE VALUE THEREOF, GIVEN THE SUBSTANTIAL MONIES INVOLVED AND THE FACT THAT WIFE CONTROLLED NEARLY ALL OF THE MONEY IN SAID ACCOUNTS.

"The trial court must make findings on all material issues, and its failure to do so constitutes reversible error 'unless the facts in the record are clear uncontroverted, and

capable of supporting only a finding in favor of the judgment.' " Carlton v. Carlton, 756 P.2d 86, 87 (Utah App. 1988) (quoting Acton v. J.B. Deliran, 737 P.2d 996, 999 (Utah 1983); Kinkella v. Baugh, 660 P.2d 233, 236 (Utah 1983)). "[T]he trial court's failure to include property valuations in divorce actions may constitute an abuse of discretion sufficient to require remand for determination." Id. at 88 (citing Jones v. Jones, 700 P.2d 1072, 1074 (Utah 1985); Boyle v. Boyle, 735 P.2d 669, 671 (Utah App. 1987)); see also Munns v. Munns, 790 P.2d 116, 119 (Utah App. 1990) (holding that a marital property distribution must be based on adequate findings and "**[t]hese findings must place a dollar value on the distributed assets**") (emphasis added).

At separation, Wife had control of eight of the nine accounts. Husband was left with $688.41 and Wife was left with $134,516.49. At the date of the bifurcated divorce decree, the balance in the accounts in control of Wife was then only $36,986.74 and the balance of Husband's account totaled $1,735.37.

In support of the Husband's position in regards to the bank accounts, Husband's expert witness, Robert Miller, testified that Defendant's Exhibit 7 represented the cash balances in the respective accounts taken either directly from the accounts or as could be imputed as best he could from the statements and records that were available. Bank statements were also admitted into evidence showing the respective balances on the dates of separation and divorce.

In spite of expert witness testimony and the relevant bank statements evidencing the value of these accounts at the different dates, the trial court found that:

> " [t]here is no specific accounting of all of the bank accounts, however, either as to the source of deposits or nature of expenditures, that will allow the Court to accurately determine any net value of the accounts to divide the same fairly. **Therefore, the Court awards each account to the holder of the same, and makes no valuation for purposes of the marital estate.**" (R. 829) (emphasis added).

Husband did offer a very specific accounting of the accounts, and Wife testified that she did not because Husband had "already provided an accounting in his exhibits about what was in [her] accounts." (R. 1024, p. 537, ll. 14-17).

Regardless, the difficulty of the valuation of a marital asset is not an adequate justification for the trial court to refuse to value said asset. See Sorensen v. Sorensen, 769 P.2d 820 (Utah App. 1989) (stating that "the mere fact that goodwill may be difficult to value or elusive in nature, does not justify ignoring or disregarding it altogether in the valuation of marital property").

Husband presented evidence, the relevant bank statements, as well as the expert testimony of a CPA, as to the value of the respective marital accounts at the relevant dates. Husband submits that this evidence on this issue was "clear and uncontroverted." Wife failed to provide evidence to the trial court as to what the balances of the accounts were, from what sources, and where the money went. In fact, Wife testified at trial that she did not

offer any such evidence because Husband "already provided an accounting in his exhibits about what was in [her] accounts." (R. 1024, p. 537, ll. 14-17). Wife argues in her Brief the evidence on this issue was "conflicting" and that the trial court made "specific findings about the parties' bank accounts." (Appellee Brief, p. 42). However, neither of these allegations excuse the trial court from considering and/or valuing the accounts, which consisted of over $135,000 at the date of separation and over $38,000 at the date of the bifurcated decree, with one party having control over at least 95% of these monies at all times.

The trial court's failure to place a value on these marital assets and to simply award them to the party who had control of them, given that Wife had control of the vast majority of these accounts, severally prejudiced the Husband, imbalanced the division of the marital estate, and is an abuse of discretion and reversible error. See Carlton, 756 P.2d at 89; Munns, 790 P.2d at 119; Boyle, 735 P.2d at 671; Jones, 700 P.2d at 1074.

A. The Trial Court Abused its Discretion in Failing to Value the Parties' Bank Accounts at the Date of Separation in Light of Wife's Dissipation of the Marital Estate.

The general rule is that the marital estate should be valued as of the entry of the divorce decree or trial. See Berger, 713 P.2d at 697; Rappleye, 855 P.2d at 262; Peck, 738 P.2d at 1052; Jense v. Jense, 784 P.2d 1249, 1252 (Utah App. 1989). "However, in the exercise of its equitable powers, a trial court has broad discretion to use a different date, such

as the date of separation, **when circumstances warrant**." Shepherd, 876 P.2d 432-33 (citing Peck, 738 P.2d at 1052) (emphasis added). "**[W]here one party has dissipated an asset**, hidden its value, or otherwise acted obstructively, the trial court may, under its broad discretion, value the property at an earlier date, i.e. separation." Peck, 738 P.2d at 1052 (citations omitted) (emphasis added).

At separation, Wife had control of eight of these nine accounts. Husband was left with $688.41 and Wife was left with $134,516.49. At the date of the bifurcated divorce decree, the balance in the accounts in control of Wife was $36,986.74 and the balance of Husband totaled $1,735.37. Therefore, the marital accounts in Wife's control diminished nearly $100,000.00 during the six months between the parties' separation and the entry of the bifurcated order. It should be noted that during this time, Wife's income was approximately $8,333.00 per month according to a Verified Motion and Child Support Worksheet submitted in October of 1995. (R. 9-15). Wife's expenses were approximately $6,606.80 per month as claimed in her Financial Declaration. (R. 164).

However, even with this surplus monthly income, Wife testified that she wrote $35,000.00 worth of checks out to herself which she "lived off" in November of 1995. (R. 1024, p. 464-65, ll. 18-25, 1-3). Another check was written out to herself on November 6, 1995 for $62,991.91 that Wife testified she used to "live on." (R. 1024, p. 466, ll. 6-17). Later, concerning this additional $63,000.00, Wife testified that:

> A. (Appellee): I don't remember what I did with it. It wouldn't -- it wouldn't have been spent all in one place. It wouldn't be something I'd remember. (R. 1024, p. 467, ll. 6-8).

This enormous amount of money out of the parties' marital estate was dissipated by Wife from the date Wife filed for divorce in October of 1995 through the end of that year.

Wife's Brief is noticeably silent as to addressing where all of this marital money went. Wife argues that "both sides gave it 'their best shot' to demonstrate that the other had hidden or used marital assets to acquire or maintain non-marital assets." (Appellee Brief, p. 31). However, no explanation is given as to the enormous amount of dissipation of marital assets by Wife. It is uncontroverted that she had approximately $1,700 per month in net income in excess of her expenses. It is also uncontroverted that she wrote approximately $100,000 in checks, made out to herself, in November of 1995 to "live off" of. The only explanation given by Wife as to where this money went was:

> A. (Appellee): I don't remember what I did with it. It wouldn't -- it wouldn't have been spent all in one place. It wouldn't be something I'd remember. (R. 1024, p. 467, ll. 6-8).

This blatant dissipation of the marital estate and "divorce planning" which Wife used to hide all of the parties' liquid assets and leave Husband with only $602.00 required that the trial court use the date of separation to value the marital bank accounts, or to at least award Husband an offset to compensate Husband for Wife's dissipation of the marital estate. See Peck, 738 P.2d at 1052; Shepherd, 876 P.2d at 433.

CONCLUSION

For the forgoing reasons, and the reasons argued in Appellant's Brief, Husband requests that this Court reverse the trial court on the issues presented and order that (1) the marital estate, with the possible exception of the parties' bank accounts, be valued at the date of trial; (2) that due to Wife's dissipation of the parties' bank accounts, that these bank accounts be valued as of the date of separation, one-half to each party, which requires an adjustment in favor of Husband in the sum of $66,914.04; and (3) that due to the substantial and speculative nature of the value of the parties' interest in Murray Parkway, LLC, that the parties' 50% membership interest be divided one-half to each. Further, Husband requests his costs on appeal.

RESPECTFULLY SUBMITTED this 21st day of June, 1999.

CORPORON & WILLIAMS, P.C.

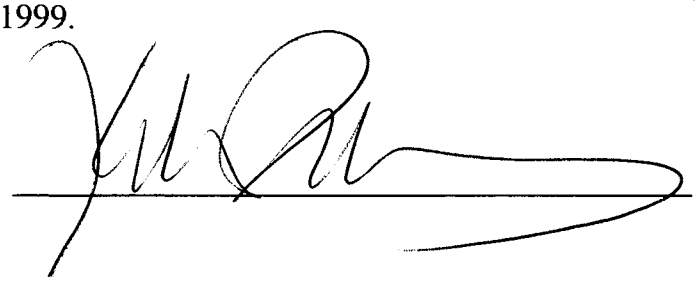
KELLIE F. WILLIAMS
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT were mailed, postage pre-paid, to the following:

SHARON A. DONOVAN
Attorney for Appellee
DART, ADAMSON & DONOVAN
310 South Main #1330
Salt Lake City, Utah 84101

DATED THIS 21st day of June, 1999.



ADDENDUM A

Bruce J. Nelson (2380)
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215 South State, Suite 900
Salt Lake City, UT 84111
Telephone: (801) 531-8400
Attorneys for Defendants Murray Parkway Associates
and Martin W. Merrill

IN THE THIRD JUDICIAL DISTRICT COURT, DIVISION I

SALT LAKE COUNTY, STATE OF UTAH

DALE S. PARKER, Plaintiff, vs. MURRAY PARKWAY ASSOCIATES, a Utah Limited Liability Company; CARLA K. PARKER, an individual; and MARTIN W. MERRILL, an individual, Defendants.	STIPULATION FOR SETTLEMENT Civil No. 970904981CM Judge William B. Bohling

The parties above-named, in full settlement of the issues of the above-entitled case, hereby stipulate and agree as follows:

1. Each of the parties hereto acknowledge that Murray Parkway Associates, L.C. ("Company") is a validly formed and currently existing Utah limited liability company. The Company is a party to certain real estate purchase contracts pertaining to real property (the "Property") located generally west of the Murray Parkway Golf Course.

2. Each of the foregoing parties acknowledges that Defendant Martin W. Merrill "(Merrill") is the owner of a fifty percent (50%) interest in the Company. The remaining fifty percent (50%) interest is owned by Defendant Carla K. Parker ("Carla") pursuant to Court determination in the pending divorce between Dale S. Parker ("Dale") and Carla, currently filed as Civil No. 954904494 in the Third Judicial District Court of Salt Lake County, Utah. The parties acknowledge, however, that such determination may be appealed by Dale. Accordingly, the Carla K. Parker interest in the Company is subject to the pending legal claims asserted by Dale in the divorce and appeal proceedings. Dale does not waive any rights or claims in that regard by entering into this Stipulation for Settlement. The purpose of this Stipulation is to acknowledge the undisputed ownership of Merrill and to allow the final decision on ownership of the other fifty percent (50%) interest to be determined through the divorce proceedings and not this action.

3. All parties stipulate and agree, subject to any subsequent divorce court order, that Dale is not a member, or manager of the Company. The Company is currently owned and managed by Defendants Merrill and Carla. At the present time, such Defendants have the right to manage the property and assets of the Company and agree to use reasonable, good-faith judgment in dealing with such property and assets. In connection with any real property owned by the Company, such Defendants have authority to develop the same, delay any development efforts, mortgage, sell, joint venture, or otherwise deal with the property as they deem in the best

interests of the Company. In connection with management of the Company, Merrill and Carla agree that they will manage the same in a manner similar to prior management practices followed by such individuals, and further agree that they will not directly or indirectly pay themselves any compensation for services rendered to the Company, other than on the same basis they would reasonably otherwise pay to a third party to render any services to the Company.

4. Notwithstanding the foregoing, the Company, Merrill and Carla agree that, absent the prior written consent of Dale upon full disclosure of the relevant facts:

a. The Company shall not engage in any business other than the development of the Property and activities reasonably related thereto.

b. The Company shall not enter, transfer or encumber any of its assets except in exchange for a reasonably equivalent value.

c. Merrill, Carla and/or the Company shall not enter into any transaction, contract or agreement that treats or affects the disputed 25% interest adversely and differently than the other members' interests. By way of example, Merrill, Carla and/or the Company shall not admit a new member to the Company or cause the Company to transfer any of its assets in exchange for any compensation or consideration paid directly or indirectly to Merrill and/or Carla that is not proportionately attributed to the disputed 25% interest.

5. The Company may distribute profits or other cash to its members. In such event, distribution of profits or other cash shall be distributed as follows:

a. 50% to Martin W. Merrill

b. 25% to Carla K. Parker

c. 25% to an interest bearing escrow account , in trust, for Dale S. Parker and Carla K. Parker, pending a final decision of the divorce court determination of the ownership interests in the Company (other than is owned by Merrill). In the event such an escrow account is to be established, Dale and Carla agree to work out, in good faith, the exact details of such account. The purpose of the account is to establish funds to be available in the event Dale is subsequently determined by the divorce court to own or is awarded any percentage interest in the Company.

i. In the event such an escrow account is subsequently established, it shall remain in effect until further stipulation of Dale and Carla, or subsequent Order of a court of competent jurisdiction over such parties.

ii. Any interest earned on such escrow account shall follow the principal thereof in any percentage in which the principal is ultimately distributed.

d. The foregoing provisions shall not apply to distributions made by the Company as the return of capital to Merrill and Carla, and distributions of capital may be made to Carla on account of the entire fifty percent (50%) interest held in her name.

However, Carla agrees that any such distributions on account of the disputed 25% interest shall be taken into account in the event the court in their pending divorce action makes some order relating to redistribution or re-division of the twenty five percent (25%) interest, and shall reduce any amount Dale would otherwise be required to pay to Carla in connection with such redistribution or re-division.

6. In the event the divorce or appellate court subsequently determines that Dale has or is awarded any ownership interest in the Company, Dale and Carla also acknowledge that an adjustment will need to be made to accurately reimburse Carla for funds in the amount of $57,615 previously paid or awarded to Dale under the divorce court Order and pertaining to this asset. Also, in the event of such determination, all parties acknowledge that Dale will be entitled to full access to the Company books and records in order to conduct an accounting thereof.

7. Plaintiff Dale S. Parker and Defendant Martin W. Merrill hereby mutually release and discharge each other from all liability, damage, claims, or obligations currently existing between the parties, including but not limited to those causes of action raised in the Complaint in the above-entitled matter.

8. Plaintiff Dale S. Parker and Defendant Carla S. Parker hereby mutually release and discharge each other from all liability, damage, claims or obligation arising from or incurred pursuant to the causes of action raised in the Complaint in the above-entitled matter, reserving

however, all claims associated with ownership of the Company which have been or may hereafter be raised in the pending divorce action.

9. For the foregoing reasons, the parties hereto stipulate and agree that the above-entitled action is hereby resolved in its entirety, that the same has been fully settled and may be dismissed with prejudice, each party to bear their own costs and fees associated herewith.

10. Dale agrees to immediately record a Release of Lis Pendens to remove any previously recorded Lis Pendens filed against the Property.

DATED this 29th day of ~~May~~ June, 1998.

Dale S. Parker

Carla K. Parker 6/29/98

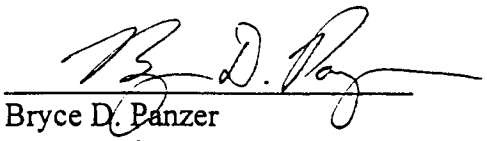
MURRAY PARKWAY ASSOCIATES, L.C.

6/29/98

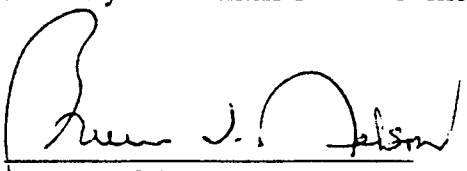
By: member/manager 6/29/98
Its: Manager

Martin W. Merrill 6/29/98

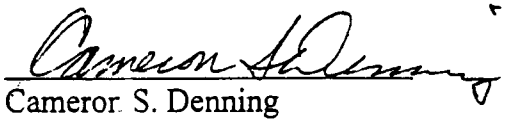
Approved:



Bryce D. Panzer
Attorney for Plaintiff Dale S. Parker



Bruce J. Nelson
Attorney for Defendants Martin W. Merrill
and Murray Parkway Associates, L.C.



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bjn\merrill\parker\Stip.ple

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Attorneys for Defendants Murray Parkway Associates
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IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

DALE S. PARKER, Plaintiff, vs. MURRAY PARKWAY ASSOCIATES, a Utah Limited Liability Company; CARLA K. PARKER, an individual; and MARTIN W. MERRILL, an individual, Defendants.	ORDER OF DISMISSAL WITH PREJUDICE Civil No. 970904981CM Judge William B. Bohling

Pursuant to joint motion of all parties hereto, and pursuant to Stipulation for Settlement executed by all parties and counsel of record, and the Court being thereby fully advised in the presmies and good cause appearing;

IT IS HEREBY ORDERED that the above-entitled action is hereby dismissed with prejudice, each party to bear their own costs and fees therein.

The parties are ordered to abide by and complete the terms of the Stipulation of Settlement previously executed by the parties and filed with the Court.

DATED this 8 day of July, 1998.

BY THE COURT:

William B. Bohling
District Court Judge

APPROVED AS TO FORM:

Bruce J. Nelson, Esq.
Attorneys for Defendants Murray Parkway Associates and Martin W. Merrill

Bryce D. Panzer, Esq.
Attorneys for Plaintiff Dale Parker

Cameron S. Denning, Esq.
Attorneys for Defendant Carla K. Parker

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